United Malayan Banking Corp v Petroleum Marketing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–2500 OF 1989
ABDUL MALIK ISHAK J
11 APRIL 2005

Civil Procedure — Action — Dismissal of action — Dismissal for want of prosecution — Whether inordinate and inexcusable delay — Delay of approximately 12 years — Prejudicial to fair trial

The third defendant and the fourth defendant appealed to the judge in chambers against the decision of the senior assistant registrar ('SAR') who dismissed their respective applications to dismiss the plaintiff's writ of summons and amended statement of claim for want of prosecution. The common grounds put forward by both defendants in their respective applications were, *inter alia,* that: (i) there had been an inordinate and inexcusable delay on the part of the plaintiff; and (ii) the unexplained delay had caused prejudice to third and fourth defendant respectively and had invariably jeopardised the fair trial of the action as well as a blatant abuse of the process of the court.

Held, allowing the third and fourth defendants' appeal with costs:

(1) The delay in prosecuting this case was inordinate and inexcusable. Such an unexplained delay by the plaintiff had caused prejudice to the defendants and had jeopardised the fair trial of the action (see para 13).

(2) As a result of the lengthy delay by the plaintiff in pursuing the action, the defendants were prevented from defending this action fairly. As demonstrated, the defendants were finding it difficult to trace material witnesses. Thus, there existed a real likelihood that such failure would seriously prejudice a fair trial of the action (see para 25).

(3) The procedural obligation to expedite the case for trial rests on the plaintiff. There was no obligation upon the defendants to ensure the early disposal of the plaintiff's claim as the conduct of the case lies entirely with the plaintiff particularly in the light of the order for the summons for directions which had been granted by the court at the instance of the plaintiff's application (see para 23).

[**Bahasa Malaysia summary**

Defendan ketiga dan keempat masing-masingnya merayu kepada hakim dalam kamar terhadap keputusan penolong kanan pendaftar ('SAR') yang menolak permohonan mereka untuk menolak writ saman dan pernyataan tuntutan terpinda plaintif kerana 'want of prosecution'. Alasan-alasan yang dikemukakan

oleh kedua-dua defendan di dalam permohonan mereka masing-masingnya adalah antara lain, bahawa: (i) terdapat kelewatan yang terlampau dan yang tidak dapat dimaafkan pada pihak plaintif; dan (ii) kelewatan yang tidak dijelaskan itu telah memprejudiskan defendan ketiga dan keempat dan telah menjejaskan perbicaraan yang adil tindakan ini dan juga merupakan penyalahgunaan proses mahkamah yang ketara.

Diputuskan, membenarkan rayuan defendan ketiga dan keempat dengan kos:

(1) Kelewatan dalam mendakwa kes ini adalah terlampau dan tidak boleh dimaafkan. Kelewatan plaintif yang tidak dijelaskan ini telah memudaratkan defendan-defendan dan menjejaskan perbicaraan yang adil untuk tindakan ini (lihat perenggan 13).

(2) Akibat dari kelewatan yang panjang oleh plaintif dalam meneruskan tindakan ini, defendan-defendan telah terhalang dari membela tindakan ini dengan adil. Sebagaimana yang ditunjukkan, defendan-defendan mendapati ianya susah untuk menjejaki saksi-saksi yang material. Oleh yang demikian, terdapat kemungkinan yang besar bahawa kegagalan sedemikian akan memprejudiskan dengan serius perbicaraan yang adil bagi tindakan ini (lihat perenggan 25).

(3) Obligasi prosedur untuk mempercepatkan kes ini untuk bicara adalah tanggungjawab plaintif. Tiada obligasi pada pihak defendan-defendan untuk memastikan yang tuntutan plaintif diputuskan dengan cepat kerana pengendalian kes terletak sepenuhnya pada plaintif terutama memandangkan perintah untuk arahan yang telah diberikan oleh mahkamah pada permohonan plaintif (lihat perenggan 23).]

Notes

For cases on dismissal of action, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 100–108.

Cases referred to

Dato' Leong Pow Kue & Ors v Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties) [1998] 7 MLJ 133 (refd)

Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors [1996] 2 MLJ 34 (refd)

Jallcon (M) Sdn Bhd v Nikken Metal (M) Sdn Bhd (No 3) [2002] 7 MLJ 223 (refd)

Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors [1995] 2 MLJ 185 (refd)

R Rajasingam v Balwant Singh Purba [1996] 2 MLJ 549 (refd)

Sii Hing & Anor v David TM Ting [1993] 1 AMR 337 (refd)

Te Cheng Hoi v Peh Im Kweng [1994] 2 MLJ 547 (refd)

TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin [1997] 3 MLJ 800 (refd)

Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152 (refd)
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin [1998] 4 MLJ 373 (refd)

Legislation referred to

Rules of the High Court 1980 O 92 r 4

R Yogeswari Rathakrishnan (Che Mokhtar & Ling) for the plaintiff in encls 148 and 164.
Michael KK Lee (YM Chin & Lee) for the third defendant in encl 148.
KK Lai (KK Lai & Co) for the fourth defendant in encl 164.

Abdul Malik Ishak J:

INTRODUCTION

[1] There are two enclosures for adjudication. One is encl 148 which is the third defendant's (Tan Hock San's) appeal to the judge in chambers against the decision of the senior assistant registrar who dismissed the third defendant's application in encl 129 to dismiss the plaintiff's writ of summons and the amended statement of claim on the ground of want of prosecution.

[2] The other is encl 164 which is the fourth defendant's (Kee Thong Seng's) appeal to the judge in chambers against the decision of the senior assistant registrar who dismissed the fourth defendant's application in encl 111 to dismiss the plaintiff's writ of summons and the amended statement of claim for want of prosecution pursuant to the inherent powers of the court.

[3] It is appropriate to state that the second defendant (Bakhtiar Tamin), the fifth defendant (Ahmad Shukri bin Md Yusof), and the seventh defendant (Norsita bte Bakri) are bankrupts. Only the sixth defendant by the name of Mohamed Nasir Abdul Majid is currently paying the loan.

[4] I shall deal first with encl 148 and this would be followed by encl 164.

ENCLOSURE 148

[5] The chronology of events for encl 148 may be stated in this way:

(1) on 25 November 1989, the writ of summons and the statement of claim were filed by the plaintiff;

(2) on 21 December 1989, the third defendant filed the memorandum of appearance;

(3) on 27 December 1989, judgment in default obtained against the first defendant (Petroleum Marketing Sdn Bhd);

(4) on 5 January 1990, the third defendant filed the defence;

(5) on 12 April 1990, the plaintiff amended the writ of summons and the statement of claim;

(6) on 22 November 1990, the third defendant amended the defence;

(7) on 24 July 1991, judgments in default were secured against the fifth defendant (Ahmad Shukri bin Md Yusof), the sixth defendant (Mohamed Nasir Abdul Majid), and the seventh defendant (Norsita bte Bakri);

(8) on 20 December 1991, summary judgments were obtained against the third defendant (Tan Hock San) and the fourth defendant (Kee Thong Seng);

(9) on 31 March 1992, a stay of execution was allowed as against the third defendant (Tan Hock San);

(10) on 3 February 1993, the third defendant's (Tan Hock San's) appeal against the summary judgment entered on 20 December 1991 was allowed by Justice Dato' Dr Zakaria bin Mohd Yatim;

(11) on 25 August 1993, as per encl 101, the plaintiff obtained the summons for directions;

(12) on 15 July 1995, summary judgment was obtained against the eighth defendant (Imatex Bhd);

(13) between the year 1994 right up to the year 2000, the whole matter remained inactive — dormant;

(14) on 17 May 2000, the plaintiff filed the notice of change of solicitors;

(15) on 7 August 2001, the plaintiff filed the notice of intention to proceed;

(16) on 13 September 2001, the plaintiff filed the notice to attend the pre-trial case management; and

(17) on 7 December 2001, the third defendant (Tan Hock San) filed an application to dismiss the plaintiff's writ of summons and the amended statement of claim on the ground of want of prosecution.

THE THIRD DEFENDANT'S (TAN HOCK SAN'S) GROUND FOR STRIKING-OFF THE ACTION FOR WANT OF PROSECUTION

[6] It is the third defendant's contention that there has been an inordinate and inexcusable delay in the plaintiff's action since the action was filed in 1989. Procrastination is certainly the thief of time. From the chronology of events as alluded to earlier, it was clearly obvious that there has been an inordinate and inexcusable delay of 12 years from the date of the issuance of the writ of summons and eight years from the date of the issuance of the summons for directions. Such unexplained delay on the part of the plaintiff had caused prejudice to the third defendant and had invariably jeopardised the fair trial of the action.

[7] It is also the stand of the third defendant that such failure on the part of the plaintiff amounted to a complete or a total disregard of the rules of the court. It is, according to the third defendant, a blatant abuse of the process of the court and that it is fair for the action to be struck off forthwith.

THE DELAY OF 12 YEARS IS SAID TO BE INORDINATE AND INEXCUSABLE

[8] In *Jallcon (M) Sdn Bhd v Nikken Metal (M) Sdn Bhd (No 3)* [2002] 7 MLJ 223, I had occasion to state the law in regard to striking out for want of prosecution in this way (see p 231 of the report):

> In a striking out application for want of prosecution, the party seeking to strike out is certainly under a burden to prove to the court as far as the first limb as alluded to earlier is concerned:
>
> (1) that there has been a delay;
>
> (2) that the delay is inordinate and inexcusable; and
>
> (3) that delay which is inordinate and inexcusable must jeopardise the fair trial of the action.
>
> And that such requirements must be read conjunctively.
>
> Whereas in regard to the second limb as alluded to earlier, the party seeking to strike out shall have the duty to show to the court:
>
> (1) that there was a delay; and
>
> (2) that such a delay was both intentional and contumelious.
>
> Again, such requirements must be read conjunctively.

[9] Now, the factual matrix of the present case involves the taking of a loan by the first defendant (Petroleum Marketing Sdn Bhd) and the guarantee given by the guarantors that took place some 20 years ago in the mid-80's. It is certainly a long time ago. The memory of days gone by are certainly fading. The third defendant (Tan Hock San) now says that he has difficulty in recollecting the events that took place years ago and he too finds it difficult to contact a material witness in this action. So the third defendant says that he is substantially prejudiced if the action were to proceed to trial.

[10] According to the third defendant, the material witness in the whole transaction is one Mr Lim Wooi Chee who was the executive director of the first defendant from 1983 to 1986. It seems that Mr Lim Wooi Chee was not only the executive director of the first defendant but he was also one of the three original guarantors for the loan granted to the first defendant. In fact, Mr Lim Wooi Chee has executed a copy of the 'Continuing Guarantee and Indemnity' dated 13 March 1984 in favour of the plaintiff to secure a loan granted to the first defendant. That 'Continuing Guarantee and Indemnity' has been exhibited as exhibit 'THS–1' annexed to encl 130 and it shows the active role undertaken by Mr Lim Wooi Chee. But for some unexplained reasons,

Mr Lim Wooi Chee has been discharged and released from all liabilities under the said guarantee without the knowledge or consent of the third defendant as well as the other guarantors notwithstanding the fact that under an existing agreement the original guarantors will continue to be the guarantors so long as the loan remains subsisting. So it can readily be surmised that Mr Lim Wooi Chee is a material witness in the third defendant's defence since he has the personal knowledge as to what had actually transpired. In short, Mr Lim Wooi Chee must have known the circumstances and the amount that has been paid to the plaintiff, if any, and he too must have known from whom and when was he able to discharge himself from the liability as the guarantor while the other guarantors are still bound by the said guarantee. All these pertinent questions are certainly crucial factors to this case and they constitute issues which ought to be tried. Indeed these issues must have prompted Justice Dato' Dr Zakaria Yatim to allow the third defendant's appeal against the summary judgment entered by the plaintiff against the third defendant on 20 December 1981. These are certainly triable issues that require a full trial.

[11] The importance of Mr Lim Wooi Chee as a witness can never be doubted. His testimony is a crucial factor that may tip the scale of justice in favour of the third defendant. Efforts to trace him were futile. It was unsuccessful.

[12] An official search was conducted at the National Registration Department to verify the current address of Mr Lim Wooi Chee. Armed with this information, a letter dated 23 November 2001 was sent to Mr Lim Wooi Chee requesting him to assist in the trial. No response was forthcoming from Mr Lim Wooi Chee. All these aggravate matters further.

[13] The delay in prosecuting this case was inordinate and inexcusable. Such delay has jeopardised the fair trial of this action.

[14] It is said that the third defendant is a well known businessman and, since 1994, has held the positions of chairman and chief executive officer of a public listed company. In recognition of his contribution to society, the third defendant has been bestowed with the Darjah Dato' Paduka Tuanku Jaafar (DPTJ) by His Majesty the Yang DiPertuan Besar Negeri Sembilan on 19 July 2001 which carries the title 'Dato'.

[15] It is also said that the suit has been hanging over the head of the third defendant indefinitely and the undue delay by the plaintiff has affected the third defendant tremendously in terms of reputation, time and costs.

[16] In *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34, the Court of Appeal speaking through Gopal Sri Ram JCA aptly said in the context of that case the following (see p 44 of the report):

> In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action.

[17] Prejudice too has crept into the present case. It must be borne in mind that the plaintiff's officers who have personal knowledge of the whole transaction have either retired or are no longer in the plaintiff's employment. Even the control and the name of the plaintiff's bank has changed several times during the period of inactivity of this action. All the events that occurred spanning over the years have further compounded the difficulty of ensuring a fair trial of the action.

THE PLAINTIFF'S FAILURE TO COMPLY WITH THE SUMMONS FOR DIRECTIONS DATED 25 AUGUST 1993

[18] It is not disputed that the plaintiff has failed to comply with the summons for directions as reflected in encl 101. That summons for directions compelled the plaintiff, *inter alia*, to submit a list of documents and to file the relevant affidavit in order to verify the list of documents within 60 days from 25 August 1993. But the plaintiff has failed, refused and neglected to comply with the order of the summons for directions dated 25 August 1993 without furnishing any reasonable explanation as to why it has failed to do so. The language of the summons for directions is pre-emptory in nature and the failure to comply will bring about dire consequences to the plaintiff's case because eight years have passed from the date of the order of the summons for directions. It is germane to mention that the order of the summons for directions has been obtained by the plaintiff since 25 August 1993 and the solicitors who acted for the plaintiff then was M/s Annuar & Associates. On20 July 1999, the plaintiff instructed M/s Che Mokhtar & Co to take over the conduct of the action. This was followed by another bout of inactivity on the part of the plaintiff's solicitors. The notice of intention to proceed was only filed on 7 August 2001. The plaintiff admits that upon the order of the summons for directions, the matter would then be set down for trial and the plaintiff was under the impression that this would be done by its then solicitors. So, according to the plaintiff, the only thing to do was to wait. But, unfortunately, nothing was actually done. And, surprisingly, this was admitted by the plaintiff.

[19] Such feeble explanation by the plaintiff leaves much to be desired. Itgives the impression that the plaintiff is attempting to put the blame on its solicitors for the inaction and thereby causing the inordinate and inexcusable delay in the prosecution of the action. In the words of Vincent Ng J in *Te Cheng Hoi v Peh Im Kweng* [1994] 2 MLJ 547, at p 555:

> (7) An inordinate or inexcusable de1ay is not confined to the action or inaction of the plaintiff himself but also to that of his lawyer (see *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152).

[20] Total disregard of the Rules of the High Court 1980 ('RHC') It is the submission of the third defendant that the inordinate and inexcusable delay

in which the plaintiff failed to explain amounts to a complete, total and wholesale disregard of the rules of the court and that the plaintiff is fully aware of the consequences of such non-compliance. It is only fair, so submits the third defendant, that the action be struck off. The third defendant even goes to the extent of submitting that there is no necessity to show prejudice in such cases. In *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373, at pp 384 to 385, Mokhtar Sidin JCA writing for the Court of Appeal succinctly said:

> From our observation, it is clear to us that from the two cases there emerged an additional limb to strike out a p1aintiff's claim. The original two limbs had been laid down in *Birkett v James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases. As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put many aspects of its operation to use.
>
> There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles stated in those two decisions.

[21] I am bound by the decision of the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi* and on the strength of that authority the third defendant is certainly entitled to have the plaintiff's case struck-off on the ground that there is an inordinate and inexcusable delay culminating in the complete, total or wholesale disregard of the rules of the court necessitating an inference thatit is only fair that the action be struck out or be dismissed forthwith. In *RRajasingam v Balwant Singh Purba* [1996] 2 MLJ 549, the Court of Appeal speaking through Mokhtar Sidin JCA said at p 554 of the report:

> It is trite that the conduct of the matter was with the plaintiff/respondent and that the defendant/appellant is entitled at any stage to apply to the court to strike out the respondent's action for want of prosecution. The delay in doing should not be held against the appellant.

[22] What Dato' Dr Visu Sinnadurai J said in *Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors* [1995] 2 MLJ 185 as encapsulated in the headnotes as seen at p 187 bears repetition and it is worded in this way:

> (6) There is no rule of practice providing that a defendant must apply to strike out an action within one month of a plaintiff serving a notice of intention to proceed under O 3 r 6 of the RHC. The defendants bore no duty to ensure the early disposal of the plaintiff's claim. Thus, the defendants' failure to respond to the plaintiff's notice of intention to proceed for almost two years and their alleged failure to comply with the registrar's order of 14 April 1989 does not bar them from applying to strike out the plaintiff's action.

[23] The sum total of it all would be this. That the procedural obligation to expedite the case for trial rests on the plaintiff. There is no obligation upon the third defendant to ensure the early disposal of the plaintiff's claim as the conduct of the case lies entirely with the plaintiff particularly in the light of the order for the summons for directions which has been granted by the court on 25 August 1993 at the instance of the plaintiff's application.

CONCLUSION IN REGARD TO ENCL 148

[24] Factually speaking, there was a delay of 12 years from the date of the issuance of the writ of summons and eight years delay from the date of the issuance of the order for the summons for directions. It is rather unfortunate that the plaintiff has failed to explain the delay. In my judgment, an unexplained delay by the plaintiff had caused prejudice to the third defendant and had jeopardised the fair trial of the action.

[25] As a result of the lengthy delay by the plaintiff in pursuing the action, the third defendant is now prevented from defending this action fairly. Asdemonstrated, the third defendant is finding it difficult to trace a material witness. There exists a real likelihood that such failure would seriously prejudice a fair trial of the action. The whereabouts of Mr Lim Wooi Chee are unknown and being a material witness his evidence would certainly be crucial to the third defendant.

[26] For all these reasons, I allow the third defendant's appeal in encl 148 with costs. I too make an order that the file is to be closed in so far as it relates to the third defendant.

ENCLOSURE 164

[27] This is the fourth defendant's (Kee Thong Seng's) appeal to the judge in chambers dated 17 February 2003 filed by the fourth defendant against the decision of the senior assistant registrar who has on 14 February 2003 dismissed the fourth defendant's summons in chambers application dated 20 August 2001 with costs for an order to dismiss the plaintiff's claim against the fourth

A defendant for want of prosecution pursuant to the inherent powers of this honourable court.

[28] The fourth defendant's summons in chambers application dated 20 August 2001 was filed pursuant to O 92 r 4 of the RHC for an order to dismiss the plaintiff's claim against the fourth defendant for want of prosecution. The grounds supporting the fourth defendant's application in encl 110 may briefly be summarised in this way:

(1) that the plaintiff having obtained an order for directions dated 25 August 1993 (hereinafter referred to as the 'said order') had failed to file and serve its list of documents and affidavit verifying the list of documents within 60 days of the said order (see para 4 of encl 112);

(2) that since 25 August 1993, the plaintiff had failed to comply with the terms of the said order;

(3) that 12 years had since lapsed after the filing of the writ of summons and the statement of claim on 25 January 1989 and eight years had lapsed since the plaintiff's obtained the said order and that such delay is said to be intentional and contumelious;

(4) that the fourth defendant as a businessman had suffered prejudice and his reputation is at stake having a suit hanging over his head for 12 years and with the presence of the court proceedings, the fourth defendant's applications for hire purchase and credit facilities were rejected outright by banks and other financial institutions;

(5) that the fourth defendant's age is advancing and he is now 54 years old and his memory is said to be fading as the years gone by;

(6) that there are eight defendants in this suit and as a result of the delay the fourth defendant is unable to contact all the defendants and the fourth defendant too is finding it difficult to contact the directors and the staff of the first defendant who is the borrower and there is a possibility that other witnesses might have passed away thus giving rise to a risk that a fair trial cannot be conducted; and

(7) that, on these facts, the 12 years delay must be construed to be intentional, deliberate, contumelious and inexcusable.

[29] Not to be outwitted, the plaintiff's reply as seen in encl 115 may be stated in this way:

(1) that RHB Bank Bhd by a court order dated 29 June 1999 took over the assets and liabilities of the plaintiff;

(2) that the plaintiff's previous solicitors was M/s Annuar & Associates and the present solicitors M/s Che Mokhtar & Co took over the matter from 20 July 1999;

(3) that on 4 August 1999, M/s Che Mokhtar & Co had received the status report of this matter from M/s Annuar & Associates where the matter herein was transferred to M/s Elaiza Merican & Asiriah on 22 January 1996;

(4) that M/s Elaiza Merican & Asiriah had since ceased practice and the relevant documents cannot be traced nor obtained;

(5) that at the same time M/s Che Mokhtar & Co is unable to conduct a file search at the Kuala Lumpur High Court registry;

(6) that only on 21 February 2000, M/s Che Mokhtar & Co managed to conduct a file search at the Kuala Lumpur High Court registry;

(7) that after the said file search, M/s Che Mokhtar & Co informed the plaintiff who then instructed M/s Che Mokhtar & Co to proceed accordingly;

(8) that the matter cannot be proceeded with as various documents were with M/s Adrian Han & Co who were the previous solicitors for the third and fourth defendants;

(9) that M/s Che Mokhtar & Co then wrote to M/s Chee Fabli & Adrian Han — the solicitors who took over the conduct of the affairs of M/s Adrian Han & Co;

(10) that at the same time there was a proposal for settlement by the eighth defendant;

(11) that although the order for directions was obtained on 25 August 1993 yet M/s Annuar & Associates informed the plaintiff that they are awaiting the court to fix the date of hearing;

(12) that the fourth defendant's file was transferred to M/s Elaiza Merican & Asiriah who had since ceased practice;

(13) that from 1993 till M/s Che Mokhtar & Co took over, there were various settlements proposed by the other defendants and the plaintiff was considering these proposals;

(14) that it has always been the intention of the plaintiff to proceed against the fourth defendant but was unable to do so because of the circumstances beyond the control of the plaintiff and the plaintiff had on 7 August 2001 filed and served its notice of intention to proceed;

(15) that the fourth defendant did not take any action until the plaintiff's notice of intention to proceed was served on 8 August 2001 and thereafter encl 111 was served on the plaintiff;

(16) that the fourth defendant's action is said to be an afterthought and that the court should consider the plaintiff's intention to proceed;

(17) that the plaintiff's action against the fourth defendant is based on a letter of guarantee dated 16 January 1989;

(18) that the fourth defendant's statement of defence is said to be a sham;

(19) that the plaintiff's papers are said to be in order because the summons for directions was heard on 25 August 1993 and, consequently, it is said that there is no prejudice against the fourth defendant and that the matter can be set down for trial now;

(20) that the plaintiff have its witnesses to prove its case and that the other defendants are of no help to the fourth defendant as they are either wound up or declared bankrupt;

(21) that the other defendants cannot deny their liabilities; and

(22) that the plaintiff, at all material times, intended to proceed against the fourth defendant.

[30] The fourth defendant then filed an affidavit in reply as seen in encl 119 and there he averred as follows:

(a) that there is no explanation at all by the plaintiff pertaining to the period of seven years beginning from 1993 right up to 2000 where the plaintiff has done nothing to set down the matter for trial;

(b) that the plaintiff did not even know that the fourth defendant's file was transferred to M/s Elaiza Merican & Asiriah on 22January 1996 as the plaintiff was still giving instructions to M/s Che Mokhtar & Co to take over the conduct from M/s Annuar & Associates and this shows that the plaintiff did not keep proper records and, most importantly, it shows that the plaintiff is not interested and has no intention to proceed against the fourth defendant;

(c) that there is no truth that the court file cannot be traced because the fourth defendant's solicitor was able to do a file search on 16 July 2001;

(d) that when M/s Che Mokhtar &Co took over the conduct of the case what they did was to issue a s218 notice against the eighth defendant that is Imatex Berhad and the main reason for doing this is because it is a public company listed on the Kuala Lumpur Stock Exchange and that company has the ability to pay and this can be seen in exh P6 of encl 115 and this

is inconsistent with what was alleged as the notice of intention to proceed was only filed and served in August 2001 and this again shows that the plaintiff has no intention to proceed against the fourth defendant;

(e) that there is no explanation at all as to why there is a delay of seven years until 21 May 2001 for the request of documents to M/s Adrian Han & Co and such delay is disrespectful to the court and is inexcusable and, consequently, the fourth defendant has suffered an irreparable prejudice and the amount of the principal claimed and the interest thereto kept on accruing;

(f) that there is no pending settlement because the plaintiff had on 29 June 1994 rejected the fourth defendant's proposal for settlement as seen in exh 'R–1' of encl 119;

(g) that the negotiations for settlement between the plaintiff and the eighth defendant are irrelevant because the plaintiff had obtained judgment against the eighth defendant and the fourth defendant has no knowledge whatsoever of the said negotiations;

(h) that the court file shows that the plaintiff had obtained judgments against all the defendants except the third and the fourth defendants and that the explanations of the negotiations between the plaintiff and the eighth defendant are irrelevant because the plaintiff had on 29 June 1994 rejected the proposal for settlement by the fourth defendant;

(i) that it is open to the plaintiff to file an action for negligence against its previous solicitors and of significance would be this: that the plaintiff is not aware of the status of its claim against the fourth defendant and that demonstrates that the plaintiff had no intention to proceed against the fourth defendant;

(j) that the second defendant (Bakhtiar Tamin), the fifth defendant (Ahmad Shukri bin Md Yusuf) and the seventh defendant (Norsita bte Bakri) had, as I said earlier, been adjudged bankrupts and the sixth defendant (Mohamed Nasir Abdul Majid) is paying the loan on a regular basis and so there is no room for settlement and, consequently, there is no explanation for the seven years delay;

(k) that M/s Che Mokhtar & Co was appointed in 1999 but the notice of change of solicitors was only filed on 17 May 2001 and the notice of intention to proceed was only filed on 7 August 2001;

(l) that the fourth defendant had on 16 July 2001 instructed his solicitors to file an application to strike out for want of prosecution and that the notice of change of solicitors was only filed on

6August 2001 and in the meantime the plaintiff's notice of intention to proceed was served on 7 August 2001 and the fourth defendant's solicitors took about 10 days to prepare the affidavit and that seems to be the reason as to why the fourth defendant's summons in chambers was filed on 20 August 2001;

(m) that the fourth defendant's application in encl 111 to dismiss the plaintiff's writ of summons and the amended statement of claim for want of prosecution is not an afterthought;

(n) that the prejudice suffered by the fourth defendant due to the inexcusable delay will give rise to a substantial risk that a fair trial cannot be held and that the plaintiff had not explained the delay of seven years; and

(o) that the fourth defendant's defence is not a sham.

[31] By way of a response, the plaintiff filed its reply as seen in encl 120 and basically there is nothing new except to repeat what was said in encl 115 and therefore there is a need to regurgitate them here.

[32] The law is quite settled.

[33] In *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 (FC), Salleh Abas F.J. (as he then was) aptly said at p 154 of the report:

> Now to conclude the judgment of the case under appeal, we reiterate that the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all as to this inactivity when called upon to do so by the court the appellants were guilty of inordinate and inexcusable delay which entitled the court to dismiss their actions for want of prosecution, if not also guilty of intentional and contumelious conduct. It will be preposterous to allow this suit to be kept alive on the basis that the appellants have right to keep the respondent waiting for so long as they like just because the substantive cause of their actions is not subject to statutory period of limitation. In our view to do so it will frustrate the amendment made to our procedural rules on 12 November 1976 which enables the court to wake up sleeping litigants.

[34] In *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin* [1997] 3MLJ 800, Shaik Daud Ismail JCA writing for the Court of Appeal succinctly said at p 715 of the report:

> In the present case, the learned judge exercised his discretion after taking into consideration all relevant matters especially the history of the action. It must also be remembered that there was already a considerable delay, even before the issue of the writ, of about twenty four years, that is after the registration of the transfer in favour of the respondent. Then, there was a further delay of nine months after the issue of the writ. The respondent kindly gave the appellants another opportunity to remedy their default by sending the reminder letter of 8 March 1996 and yet they failed to comply. This failure, in our view, is contumelious.

There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view, it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hong Kong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo* [1996] 2MLJ 34). Added to this is the fact that the appellants had obtained an injunction restraining the respondent from dealing with his own property and had also caveated the property. Having obtained the injunction and caveated the property, the appellants appear to be satisfied not to proceed to trial. From this, it can be inferred that the primary purpose of filing the writ appear to be a vehicle to obtain the injunction.

[35] In *Dato' Leong Pow Kue & Ors v Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties)* [1998] 7 MLJ 133, I did say that for a defendant to succeed in his action to strike out the plaintiff's claim for want of prosecution, it is not sufficient for the defendant to establish inordinate and inexcusable delay. There is another burden imposed on the defendant and that would be for the defendant to produce evidence that a fair trial is impossible or that he had suffered or is likely to suffer some serious prejudice as a result of the delay and what is serious prejudice is entirely a matter of fact and degree.

[36] In my judgment, the fourth defendant has no doubt established the first condition of inordinate and inexcusable delay on the part of the plaintiff who had done nothing after obtaining the order for directions on 25 August 1993 and the second condition that a fair trial is impossible or there is a risk that a fair trial is not possible is the fact that the fourth defendant as a businessman and having a suit hanging over his head for 14 years — from 1989 right up to 2003, had affected his reputation and that his applications for hire purchase and credit facility had been rejected by financial institutions and further by virtue of his advancing age — now 54 years old, and coupled with his fading memory and the difficulty of locating the directors of the first defendant and its staff with the possibility that such witnesses had passed away, the risk of a fair trial is certainly doubtful.

[37] It is part and parcel of my judgment that prejudice suffered by the fourth defendant as adumbrated above is real and foreseeable and contrary to the averment of the plaintiff that the cause of action of the plaintiff is based on a letter of guarantee. It is also my judgment that the plaintiff has the duty to prove the default of the first defendant who is the borrower and that the amounts outstanding can only be proved by producing cogent evidence to the court as to what amounts had been repaid by the first defendant. Further it is also my judgment that the liability of the fourth defendant is merely secondary and notwithstanding this fact, the fourth defendant has to call the directors and the staff of the first defendant to testify.

[38] Another significant fact to consider would be this. That although the plaintiff keeps on saying that it has witnesses to testify yet it must be borne in mind that the plaintiff has since been taken over by RHB Bank Bhd and so

all the officers who have personal knowledge of the transaction might not be there anymore since most of them have either resigned or have joined other financial institutions. In this context, in the case of *Dato' Leong Pow Kue & Ors v Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties)*, I relied on the case of *Sii Hing & Anor v David TM Ting* [1993] 1 AMR 337 and I continued to say (see pp 456 to 457 of the report):

> I may add that the problem may be further confounded when the case is an old case and the makers of the documents cannot be found and therefore cannot attend court to testify. Without the makers of the documents the trial court would certainly be impeded unless of course the absence of the makers would not lead to the inadmissibility of the documents and those documents are not used for a hearsay purpose or those documents fall under the hearsay exception. In the same vein, the learned judge in the case of *The Plato* remarked at p 839 of the report:
>
> > Even if there are witness statements and ship's records available, the makers of these documents are still required to be present in court before these can be adduced in evidence.

In *Bliss v Lambeth, Southmark & Lewisham Area Health Authority* [1978] 1 WLR 38, the facts showed that the action for negligence was left hanging over the defendants' heads for more than 11 years. It aggravated the anxiety of litigation and the delay was held to have affected the defendants' professional reputation. Here, Mr Gan Kim Sing, an experienced advocate and solicitor of excellent standing in Johor Bahru and the sole defendant must have been prejudiced. The psychological effect of the suit hanging over his head since 1989 must have been traumatic and beyond description. Mr M Pathmanathan, learned counsel for the defendant, submitted that the delay of more than seven months before the plaintiffs filed their summons for directions must be considered as inordinate and prejudicial to the defendant and a fit case for striking out for want of prosecution. The facts would certainly speak for themselves.

[39] Likewise in *Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors*, Dato' Dr Visu Sinnadurai J in style said (see p 941 of the report):

> (b) Prejudice
>
> As seen earlier, the defendants need not firmly establish that the delay had already caused serious prejudice to them. The proper test is that the delay had not only caused prejudice, but also whether it is likely to do so. For so long as the delay is likely to cause serious prejudice, there is also a risk that it is not possible to have a fair trial.
>
> One factor to bear in mind is that as both the defendants are professionals, the longer the case is delayed, the greater would be the loss to their reputation.
>
> I must, however, emphasise that I have taken note of the fact that though both the defendants are professionals, this by itself is not sufficient to indicate prejudice so as to warrant the striking out of the action. It is only one of the factors I have taken into account, but it is certainly not the sole factor. In this regard, the caution expressed by Lord Griffiths in *Department of Transport v Chris Smaller (Transport) Ltd*

has to be borne in mind. Lord Griffiths observed ([1989] AC 1197 at p 1209; [1989] 1 All ER 897 at p 905; [1989] 2 WLR 578 at p 587):

> There are, however, passages in some of the judgments that suggest that the mere sword of Damocles, hanging for an unnecessary period, might be a sufficient reason of itself to strike out. On this aspect, I repeat the note of caution I expressed in the Court of Appeal in *Eagil Trust Co Ltd v Piggot Brown* [1985] 3 All ER 119 at p 124, where I said:
>
> > Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice. Biss's case is an example of such an exceptional case, the action hanging over for 11½ years, with professional reputations at stake.

[40] It is common ground that these days, banks and financial institutions will blacklist any litigants whether they are involved in simple summonses, civil suits, bankruptcy and winding-up proceedings or the like. Banks and financial institutions in the country are certainly heartless. They would go to the extreme to ensure that they would not incur losses. This is the kind of prejudice which the fourth defendant as a businessman would face and continue to face so long as the suit is hanging over his head for the last 14 years.

[41] For all these reasons, I would allow the fourth defendant's appeal in encl 164 with costs. This means that the order of the senior assistant registrar dated 14 February 2003 should be set aside forthwith. I too make an order that the file is to be closed in so far as it relates to the fourth defendant.

Third and fourth defendants' appeals allowed with costs.

Reported by Izzaty Izzuddin